Supreme Court, U.S.
FILED
SEP 21 1989
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 89-305

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

SHERYL McGUIRE, INDIVIDUALLY AND AS MOTHER AND NEXT FRIEND OF MIKE McGUIRE, A MINOR, PETITIONERS

v.

THE CITY OF WOODWARD, OKLAHOMA, A MUNICIPAL CORPORATION; CLIFFORD HUNTER; JOSE SANCHEZ; DAVID CARRINGER; BRUCE STORM, RESPONDENTS

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Jim T. Priest
McKINNEY, STRINGER & WEBSTER, P.C.
101 North Broadway
Oklahoma City, Oklahoma 74103
405/239-6444
Attorneys for Respondents City and Storm

Reggie N. Whitten
MILLS, WHITTEN, MILLS, MILLS & HINKLE
500 One Leadership Square
Oklahoma City, Oklahoma 73102
405/239-2500
Attorneys for Respondents
Carringer, Hunter and Sanchez

29pp

TABLE OF CONTENTS

STATEMENT OF FACTS 3

I.

THE TENTH CIRCUIT'S OPINION IS NOT IN CONFLICT WITH OPINIONS OF OKLAHOMA'S CRIMINAL APPEALS COURT REGARDING THE MANNER OF CONDUCTING AN INVESTIGATORY STOP 7

II.

THE TENTH CIRCUIT'S OPINION IS NOT IN CONFLICT WITH THIS COURT'S OPINIONS IN TERRY v. OHIO AND ADAMS v. WILLIAMS 18

CONCLUSION 24

CERTIFICATE OF MAILING 26

TABLE OF AUTHORITIES

Adams v. Williams
407 U.S. 143 (1972) 2, 9, 18, 21-24

Burns v. Oklahoma
595 P.2d 801
(Okla. Crim. 1979). 7, 9, 11, 13-15, 17

Castellano v. State
585 P.2d 361
(Okla. Crim. 1978). 11, 13, 15, 17

Terry v. Ohio
392 U.S. 1 (1968) 2, 8-10, 16-18, 21-24

United States v. Merritt
695 F.2d 1763
(10th Cir. 1982). 9-11, 15

Fourth Amendment. 8, 9, 14, 17, 22, 24, 25

7208F/G

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

No. 89-305

SHERYL McGUIRE, INDIVIDUALLY AND AS MOTHER AND NEXT FRIEND OF MIKE McGUIRE, A MINOR, PETITIONERS

v.

THE CITY OF WOODWARD, OKLAHOMA, A MUNICIPAL CORPORATION; CLIFFORD HUNTER; JOSE SANCHEZ; DAVID CARRINGER; BRUCE STORM, RESPONDENTS

RESPONSE OF THE CITY OF WOODWARD, OKLAHOMA, CLIFFORD HUNTER, JOSE SANCHEZ, DAVID CARRINGER AND BRUCE STORM TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

In their attempt to inspire certiorari review by this Court of the Opinion below, Petitioners have listed eight matters under the heading of "Questions Presented." However, a review of these proffered "questions" reveals that

Petitioners' complaints can be synthesized into two appropriate and relevant issues:

> 1. Whether the Tenth Circuit's decision is in conflict with the interpretation by the Oklahoma Criminal Court of Appeals as to the manner of conducting a proper investigatory detention.
>
> 2. Whether the Tenth Circuit's decision runs afoul of this Court's opinions in Terry v. Ohio, 392 U.S. 1 (1968) and Adams v. Williams, 407 U.S. 143 (1972).

Since Petitioners have chosen to forego a Petition for Rehearing in the Tenth Circuit and any means of direct appeal to this Court, the above noted issues are the only proper bases upon which certiorari may be considered. If Petitioners fail to support these arguments the Petition for Certiorari must be denied. As noted below, the

arguments advanced by Petitioners are factually and legally insufficient and certiorari should be denied.

STATEMENT OF FACTS

In their brief representation of the facts, the Petitioners fail to advise the Court of several salient facts that are essential to resolution of this matter. The events giving rise to the actions by the Defendant police officers began at a shopping center in Woodward, Oklahoma, where several shoppers had gathered for an outdoor "sidewalk sale". Earlier that afternoon, Sheryl McGuire and her teenage son, Michael, parked their car just outside a department store at the shopping center. Although they entered a store together, Michael later returned to the car and

waited alone for several minutes for his mother to return.

While waiting in the car, Michael picked up a B.B. gun which was a facsimile of a .357 Ruger and, by his own admission, rubbed the handle of the gun against his face in a vertical manner. These gestures were visible to pedestrians at the shopping center.

Two women at the shopping center saw the gun being handled by Michael and excitedly ran into the adjacent department store, reporting to the manager that a man in front of the store was waving a gun. The manager telephoned the Woodward Police Department and reported that a man was in the parking lot with a gun and asked the police department to send an officer.

The report was relayed to Officer David Carringer who proceeded to the shopping center. Meanwhile, Sheryl McGuire had returned to her car and began driving out of the parking lot and onto the state highway. As Officer Carringer drove up to the department store, the manager ran outside and in an excited and frightened manner pointed at the Petitioners' car and identified it as the vehicle carrying the man with the gun. Officer Carringer, backed up by Officers Jose Sanchez and Clifford Hunter, pursued the Petitioner's car with overhead lights flashing while the car changed lanes several times. Finally Sheryl McGuire stopped the car a few blocks away. Because they had been told that the suspect had a weapon, the officers drew

their guns and instructed the Petitioners to step out of their car. The Petitioners were told to lie down on the ground in a prone position so that a pat-down search could be made for weapons.

No weapons were found on the Petitioner's bodies and they were only on the ground for a few minutes. However, on the front seat of the car, the police officers found the gun which prompted the citizen report. Only upon closer examination was it determined that the gun in question was actually a pellet gun that closely resembled an actual .357 Magnum revolver. After the weapon was identified as a pellet gun, the officers explained their concerns to the Petitioners and the Petitioners left the scene.

This recitation of the facts is critically essential to a proper resolution of this case since the propriety of the officers' actions must be measured in the context of these circumstances.

I.

THE TENTH CIRCUIT'S OPINION IS NOT IN CONFLICT WITH OPINIONS OF OKLAHOMA'S CRIMINAL APPEALS COURT REGARDING THE MANNER OF CONDUCTING AN INVESTIGATORY STOP.

In their invitation to this Court to grant certiorari, the Petitioners begin with a fundamentally flawed presupposition that once a police officer draws his gun on a citizen that citizen is automatically "under arrest". Petitioners base this erroneous conclusion on a facile reading of Oklahoma case law, particular Burns v.

State, 595 P.2d 801 (Okla. Cr. 1979), and infer that the Tenth Circuit's decision in the case below is in conflict with the substantive law of Oklahoma. In fact, however, there is no conflict to be resolved when the issues of this case and the authorities cited by Petitioner are measured against the "reasonableness" standard of the Fourth Amendment.

Petitioners adopt a rationale that focuses analysis on the degree of force used by police in order to determine whether the police crossed some line of demarcation drawn between a Terry stop and an arrest. Yet such an approach misses the mark of the Court's true concern in this case, i.e., whether, under the Fourth Amendment, the police acted reasonably

under the totality of the circumstances. This central constitutional concern must serve both as the yardstick of conduct and the synthesizer of case law in every Fourth Amendment lawsuit. As the Tenth Circuit stated in United States v. Merritt, 695 F.2d 1263 (10th Cir. 1982)

> We should not ask whether the force used was so great as to render it an arrest but, instead, whether the force used was reasonable.

Id. at 1274. This same question is the one posed in Terry, Adams, and Burns and it is the proper focus of inquiry in the case at bar.

In the Opinion below, the Tenth Circuit emphasized that the focal analysis was "whether the officers' actions were 'reasonably related in scope to the

circumstances which justified the interference in the first place.'" (Opinion below contained in the Petition for Certiorari at p. 1F, citing Terry, supra, 392 U.S. at 20.) The court then cited its previous opinion in United States v. Merritt, 695 F.2d 1263 (10th Cir. 1982), as support for the officers' actions in drawing their guns during the investigatory stop. In Merritt the responding officers were advised that the suspects were potentially armed with a gun. In validating the investigatory detention, the Tenth Circuit held that:

> The use of guns in connection with a stop is permissible where the police reasonably believe they are necessary for their protection." Id. at 1272.

In their effort to obtain a review by this Court, Petitioners advance that the Merritt opinion is contrary to established Oklahoma law. In this regard, Petitioners rely exclusively on Castellano v. State, 585 P.2d 361 (Okla. Crim. 1978), and Burns v. Oklahoma, 595 P.2d 801 (Okla. Crim. 1979), for the proposition that investigatory stops cannot be made at gun point. However, Castellano and Burns are not legally inconsistent with Merritt, as Petitioners suppose. Rather, the critical difference between the Oklahoma cases and Merritt is in the facts presented to the responding police officers, not in the legal interpretations by the respective courts.

The Castellano decision did not specifically address the issue of an

investigatory stop at gun point although it did speak to the distinction between an investigatory stop and an arrest.

> The distinction between an investigatory detention and a full arrest is largely a matter of degree. Both involve significant intrusions upon the privacy of the individual although an investigatory detention which does not result in an arrest is of much shorter duration than an arrest. The line between an investigatory detention and an arrest can indeed be thin, and often depends upon the intention of the officer involved.

Id. at 365.

The Oklahoma court went on to say that the key issue in distinguishing the two intrusions was whether the officer was attempting to restrain liberty or take

custody. Yet, while making this distinction the Castellano court did not whisper a hint that the use of an officer's gun would transform a stop into an arrest.

In Burns, the Oklahoma court was addressing the issue of when an arrest had taken place and whether the arrest was authorized at the time it took place. In Burns, a police officer pulled over a suspect vehicle based only upon the barest of suspicion. With gun drawn the officer ordered three citizens out of the vehicle. At that point the officer recognized two persons who fit the description of suspects wanted by the police so he handcuffed all three individuals, searched the vehicle and found a weapon.

The question in Burns was not whether an arrest had taken place because clearly there was an arrest; the issue in Burns was when the arrest took place and whether probable cause existed at that time. In a retrospective analysis the Oklahoma court determined that the arrest occurred when the suspects were ordered out of the car at gun point; the court concluded that no probable cause for arrest existed at that point and, therefore the weapon found in the truck was illegally seized. Once again, the Burns court focused upon the reasonableness of the officer's conduct in light of the citizens' Fourth Amendment protections.

Although the Burns court, in dicta, stated that investigatory stops

are not made at gun point, Burns does not represent authority for Petitioners' broader conclusion that all stops made with drawn guns are arrests. Instead, Burns is an opinion fundamentally based on the reasonableness of the officers' actions in light of the totality of the circumstances. Petitioners read Burns for more than it is worth. When carefully analyzed Burns does not lend true support for Petitioners' sweeping statement that a drawn weapon transforms a stop into an arrest. Burns, like Castellano, focuses on reasonableness.

In the case at bar, as in Merritt but unlike Burns and Castellano, the police officers were operating with a direct report that the occupants of the car were armed with a gun. As such, the police

officers' use of their weapons and instructing the subjects to get out of the car was the result of their justified need for safety, rather than a factor that evidences an unreasonable intrusion. As noted by the Tenth Circuit in the Opinion below, the right of the police officers to use reasonable means to protect themselves has been fully embraced by this Court in Terry:

> [W]e cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest. When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and

> presently dangerous to the officer or others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm. (Opinion below contained in the Petition for Certiorari at p. 11, citing Terry, supra, 392 U.S. at 24.)

Thus, the report in this case that the suspects were armed with a weapon distinguishes the facts herein from the Castellano and Burns cases and substantiates the officers' use of their guns as a valid means to protect themselves. The officers acted reasonably under the Fourth Amendment and as such, there is no conflict between the opinions of the Tenth Circuit and the Oklahoma Court

of Criminal Appeals. Therefore, the Petition for Certiorari should be denied.

II.

THE TENTH CIRCUIT'S OPINION IS NOT IN CONFLICT WITH THIS COURT'S OPINIONS IN TERRY v. OHIO AND ADAMS v. WILLIAMS.

Petitioners also claim that the Tenth Circuit's opinion in the case below "presents a deviation from this Court's prior holdings in that the Tenth Circuit has now allowed a much broader area of activity to constitute a Terry investigation than has been previously allowed by this Court." (Petition for Certiorari, p. 8.)

In an attempt to support this assertion, Petitioners claim that the only information possessed by the Woodward

Police Officers at the time they stopped them was that Petitioners had a gun in their possession and that since possession of a firearm is not a public offense, there was no cause for the officers to "arrest" the McGuires. (Petition for Certiorari, p. 8.)

The Petitioners' brush paints with too short a stroke. The factual foundation of the Tenth Circuit's decision clearly included much more evidence than this. As noted by the Tenth Circuit, the stop of the Petitioners was warranted by the following specific and articulable facts, and rational inferences drawn from these facts:

> 1. The police received a report that a man was in front of a store in a shopping center with a gun, and were requested

to send a police officer;

2. When an officer arrived at the scene, a man came running out of the store, upset and frightened, and pointed at a car leaving the parking lot, saying "There goes the man with the gun,";

3. The subject car was leaving the parking lot and entering a state highway; and

4. When the officer followed the car, it changed lanes several times to avoid the police car behind it.

(Opinion below contained in the Petition for Certiorari at p. 1D-1E.)

The Tenth Circuit held that this totality of information presented sufficient circumstances to give the

Woodward Police Officers reason to suspect that the Petitioners had committed, were committing or were going to commit a crime and, thus, had sufficient reason to stop the vehicle. (Opinion below contained in the Petition for Certiorari at p. 1E.)

As espoused by this Court in Adams v. Williams, supra, the very cornerstone of a police officer's authority to conduct an investigatory stop is that the totality of the situation warrants the preservation of the status quo until additional information can be obtained:

> In Terry this Court recognized that a "police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable

> cause to make an arrest." The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest, to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, Terry recognizes that it may be the essence of good police work to adopt an intermediate response.
>
> A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time.

Adams, supra., 407 U.S. at 145-46 [emphasis added].

The element of "suspicious" behavior noted in this passage indicates

that the totality of circumstances presented to the officers is to be taken into account in assessing the situation. This includes not only that oral report that is given to the police officer, but also factors that give rise to the rational inferences drawn by the police officer, such as the conduct and actions of the reporting persons, the need for expeditious action and the circumstantial surroundings.

In the present case, it is the Tenth Circuit's reliance on these additional aspects of the evidence which validates its decision under this Court's decisions in Terry and Adams. Contrary to Petitioners' contentions, the Opinion below by the Tenth Circuit is not an enlargement of the scope of an investigatory stop.

Rather, this case was decided in full accord with the reasonableness standard of Terry and Adams. Once again, the focus of inquiry in this Fourth Amendment case must be the reasonableness of the officers' actions considered in the totality of the circumstances. Since the officers' actions in this case were reasonable, the detention was of short duration, and the stop was designed merely to check and maintain the status quo, the police actions were perfectly consistent with Terry and Adams. Accordingly, the Petition for Certiorari should be denied on this basis.

CONCLUSION

Petitioners attempt to create a thin veneer of conflict between the decision below and the decisions of this

Court as well as the Oklahoma Court of Criminal Appeals. However when the veneer is stripped to the bare wood of these decisions there is, in fact, no conflict at all. The Fourth Amendment standard of reasonableness is the common grain that runs throughout these cases and there is no splinter or warp among them. Accordingly, the Petition for Certiorari should be denied.

Respectfully submitted,

JIM T. PRIEST
Attorneys for Respondents
The City of Woodward and
Bruce Storm

OF COUNSEL:

McKINNEY, STRINGER & WEBSTER, P.C.
101 North Broadway
Oklahoma City, OK 73102
405/239-6444

REGGIE N. WHITTEN
Attorneys for Respondents
Carringer, Hunter and
Sanchez

OF COUNSEL

MILLS, WHITTEN, MILLS, MILLS & HINKLE
One Leadership Square, Suite 500
211 North Robinson
Oklahoma City, OK 73102

CERTIFICATE OF MAILING

On this 21st day of September, 1989, a true and correct copy of the above and foregoing instrument was mailed, postage prepaid thereon, to:

A. T. Elder, Jr.
Rodney C. Ramsey
Stewart & Elder
1329 Classen Drive
P.O. Box 2056
Oklahoma City, OK 73101
Attorneys for Petitioners

JIM T. PRIEST

7645m/G